No. 82-1059

In the Supreme Court of the United States

October Term, 1982

TED SIMON, et al.,
Appellants

vs.

WILLIAM R. DAVIS, Secretary of the Commonwealth of Pennsylvania and RICHARD THORNBURGH, Governor of the Commonwealth of Pennsylvania,
Appellees

On Appeal From the United States District Court for the Middle District of Pennsylvania.

MOTION TO AFFIRM OF APPELLEES DAVIS AND THORNBURGH

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MOTION TO AFFIRM

Appellees William R. Davis, Secretary of the Commonwealth of Pennsylvania, and Dick Thornburgh, Governor of the Commonwealth of Pennsylvania, by their attorneys, hereby ask this Court to affirm the decision of the United States District Court for the Middle District of Pennsylvania, dated September 13, 1982, on the grounds that the questions upon which the decision of this case depends are so insubstantial as not to require further argument.

ARGUMENT

I. THE DIVISION OF WESTMORELAND COUNTY AMONG THREE CONGRESSIONAL DISTRICTS DOES NOT VIOLATE ANY PROVISION OF THE CONSTITUTION

In re-districting the Commonwealth for the 1980's, Pennsylvania's Act 42 divides Westmoreland County among three congressional districts. App. to Juris. Statement at 47a. The appellants have challenged the constitutionality of this division on several grounds, none of which finds any support in the Constitution or the decisions of this Court.

A common thread in the appellants' various arguments is their contention that congressional districts, in addition to being of substantially equal population, must also provide a "meaningful relationship" between Representatives and their constituents. Juris. Statement at 12; *id.* at 8, 16. This in turn, they say, requires districts that are compact, contiguous "political communities," *id.* at 12-16, as opposed to the districts in Act 42, which they characterize as "illogical, irrational, and . . . not . . . political communities with any meaning." *Id.* at 8.

Whatever may be the merits of this contention as a matter of social science theory, it has no basis in the Constitution. The Constitution does not require the States to draw compact districts, or contiguous districts, or "meaningful" districts; the Constitution does not require that there be districts at all. At-large congressional elections

were widespread in the early years of the United States, *Wesberry v. Sanders,* 376 U.S. 1, 8 (1964), and the practice survived in some states at least into the 1960's. *Id.*, 376 U.S., at 20, n. 1 (Harlan, J., dissenting).

Furthermore, the districts in question are neither illogical nor irrational. As the District Court said, their configurations resulted from "the legislature's decision . . . to provide some assistance to a Republican incumbent in his contest with his Democratic opponent." App. to Juris. Statement at 23a. Drawing district lines so as to preserve an incumbent's seniority advances a rational and legitimate state interest recognized by this Court. *White v. Weiser,* 412 U.S. 783, 791 (1973).

The District Court correctly pointed out that

> The Supreme Court has often reminded the federal courts that "state legislatures have primary jurisdiction over legislative reapportionment." *White v. Weiser,* 412 U.S. at 795. "Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task." *Id.* at 796. "Politics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings,* 412 U.S. at 753.

App. to Juris. Statement at 23a-24a. Accordingly, this Court has overturned legislative redistricting plans only when necessary to vindicate some right explicitly guaranteed by the Constitution. *See Wesberry v. Sanders, supra* (equality of representation); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960) (racial gerrymandering). Otherwise, "a State is constitutionally free to redraw political boundaries in any manner it chooses." *Mobile v. Bolden,* 446 U.S. 55, 63 (1980).

In contrast to this approach, the appellants would have this Court engraft onto the Constituion their own predilections as to "sound districting principles" and "democratic theory." Juris. Statement at 12, 13. Those contentions are so devoid of substance as not to require further argument.

A second common thread in the appellants' arguments is their contention that Act 42 somehow deprives them of their rights under the First Amendment, especially of their right to freedom of association. Juris. Statement at 7, 12, 16-17. At first glance, this seems to be a variation on *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), in which this Court held that, with some exceptions, public employees could not be discharged because of their partisan political affiliations. *See* Juris. Statement at 16.

Elrod and *Branti* thus involved the use of the power of government to punish those who belonged to the "wrong" party, and it might seem that the appellants are arguing that the drawing of district lines with an eye toward obtaining a partisan political advantage infringes on the First Amendment rights of members of the "out" party. But this is not so. As the District Court found, Act 42 was enacted by a Republican legislature, in part to aid a Republican incumbent, App. to Juris. Statement at 4a, 23a, and the appellants emphasize that they themselves are also Republicans Juris. Statement at 9.

The analogy to *Elrod* is therefore inappropriate. Moreover, the appellants never specify in what manner they believe their First Amendment rights to have been violated, nor do they describe the nature of the associations which have been interfered with. This argument is therefore also without substance.

II. ACT 42 DOES NOT EMBODY EXCESSIVE POPULATION DEVIATIONS

Relying on *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the appellants argue that Act 42 should be set aside solely because there existed alternative plans with smaller population deviations. Juris. Statement at 18. The appellants ignore the fact that the deviation between the largest and smallest districts under Act 42 is only .2354% —a figure that the District Court found could have "only a miniscule, immeasurable effect on relative representation." *Id.* at 17a, 31a-32a. They ignore also the fact that the plan with the lowest population variances was only .1459% lower than Act 42—a proposal that differed from Act 42 "in only an extremely minor degree." *Id.* at 15a. *See id.* at 15a-18a.[1]

They ignore, finally, the fact that the six plans considered by the legislature which had lower population deviations than Act 42 were not identical in other respects. They had varying impacts on the voting power of racial minorities, and they had varying impacts on the existing relationships between incumbents and their constituents.

[1] In addition, both this Court and the District Court have recognized the inherent limitations of the census data which serve as the basis for re-districting decisions. The census measures total population, not voters, and it does so only on a given day. Even as to that day, the census figures are inaccurate by at least one percent; every day thereafter, births, deaths and migrations increase that inaccuracy. App. to Juris. Statement at 12a-13a, *citing Gaffney v. Cummungs*, 412 U.S. 735 (1973). To erect a structure of "arithmetical absolutism" on such an imprecise foundation is, as the District Court said, a "dubious exercise." App. to Juris. Statement at 14a.

Id. at 4a, 34a (Finding 25), 35a (Finding 31), 36a-37a (Finding 42), 40a (Finding 61), 44a (Finding 96), 49a (Finding 131), 54a (Finding 171). *See United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (racial factors appropriately taken into account in districting); *White v. Weiser, supra* (state's interest in maintaining representative-constituent relationship not to be disparaged).

The accommodation of these interests is preeminently a legislative function, especially when the choice is among plans which differ from each other only marginally. The District Court recognized this. App. to Juris. Statement at 15a. The appellants' mechanical application of *Kirkpatrick*, on the other hand, reduces this Court's decisions to "a scholastic obsession with abstract numbers [and] a rigid insensitivity to the political realities of the reapportionment process." *White v. Regester*, 412 U.S. 755, 780-81 (1973) (Brennan, J., dissenting).

CONCLUSION

For the foregoing reasons, Appellees William R. Davis and Dick Thornburgh ask this Court to affirm the order of the court below.

Respectfully submitted,

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